

SOAH DOCKET NO. 582-06-0393  
TCEQ DOCKET NO. 2005-1184-MWD

2004 DEC 12 PM 3:21

APPLICATION OF UA HOLDINGS § BEFORE THE TEXAS COMMISSION OFFICE  
1994-5 FOR A NEW TPDES PERMIT § ON  
NO. WQ 14468-001 § ENVIRONMENTAL QUALITY

**UA HOLDINGS 1994-5'S WRITTEN EXCEPTIONS TO THE PROPOSAL FOR  
DECISION AND MOTION TO REOPEN THE RECORD**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

COMES NOW Applicant UA Holdings 1994-5 ("UA"), and files this its *Written  
Exceptions to the Proposal for Decision and Motion to Reopen the Record*, and would  
respectfully show the following:

**I. BACKGROUND**

UA filed application No. 14468-001 (the "Application") with the Texas Commission on  
Environmental Quality ("TCEQ" or the "Commission") on July 17, 2003. In the Application,  
UA requested a permit to discharge treated domestic wastewater at a daily average flow not to  
exceed 180,000 gallons per day in the interim phase and 360,000 gallons per day in the final  
phase. Pursuant to the Application, the wastewater will be treated by UA at the Sunrise Ranch  
Wastewater Treatment Facility, which will serve the Sunrise Ranch Subdivision in Montgomery  
County, Texas.

The Application was declared administratively complete on September 4, 2003, and the  
Notice of Receipt of Application and Intent to Obtain Permit was published September 15, 2003.  
The Notice of Application and Preliminary Decision for Water Quality Permit was published on  
November 26, 2003 and a public meeting on the draft permit was held in Montgomery on April  
15, 2004.

The Commission referred the Application to the State Office of Administrative Hearings ("SOAH") on October 17, 2005 for a hearing on the merits with regard to the following three issues:

1. Whether the effluent limitations in the draft permit are designed to maintain and protect the existing instream uses and are consistent with Texas Surface Water Quality Standards;
2. Whether the permitted discharge will adversely impact the use of Mr. Joslyn's property; and
3. Whether issuing the permit is consistent with TCEQ's regionalization policy (collectively, the "Referred Issues").

At the SOAH preliminary hearing on February 15, 2006, Phil Berthelot, Doug Joslyn, and Maria Brasher (collectively, the "Protestants") were granted party status. The Executive Director for TCEQ (the "ED") and the Office of Public Interest Council ("OPIC") were also parties to the hearing.

Shortly before the commencement of the hearing on the merits, the ALJ struck a large portion of the prefiled testimony of UA's witness, Patrick Aucoin, because the ALJ determined that Mr. Aucoin was generally not qualified to testify regarding the Referred Issues.<sup>1</sup>

The hearing on the merits took place on September 11, 2006. UA offered the testimony of Mr. Aucoin during the presentation of its direct case. At the close of UA's direct case and before the Protestants presented their evidence, the Protestants moved for dismissal on the basis that UA failed to meet its burden of proof regarding at least one of the Referred Issues.<sup>2</sup> The Administrative Law Judge ("ALJ") granted the Protestants' motion and concluded the hearing at that time.<sup>3</sup> UA then submitted an Offer of Proof in accordance with Tex. R. Evid. 103, offering

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<sup>1</sup> Administrative Law Judge's Order No. 8, issued September 5, 2006.

<sup>2</sup> Transcript of Proceedings before the State Office of Administrative Hearings (for the Texas Commission on Environmental Quality) Austin, Texas, Application of UA Holdings 1994-5, LP DBA SC Utilities, Inc., for New TPDES Permit No. WQ 14468-001, In Montgomery County, SOAH Docket No. 582-06-0393, TCEQ Docket No. 2005-1184-MWD, page 71, line 17 through page 77, line 15 (September 11, 2006).

<sup>3</sup> *Id.*

the testimony of six witnesses, including TCEQ staff, professional consultants, and Mr. Aucoin, which constituted the evidence it would have introduced to the record if permitted by the ALJ.<sup>4</sup>

Shortly after UA notified the Administrative Law Judge ("ALJ") and the parties that it had retained a new attorney of record in this proceeding, the ALJ issued a Proposal for Decision ("PFD"), recommending that the Commission deny the Application because UA failed to meet its burden of proof regarding the water quality issue.

## **II. ARGUMENT**

UA excepts to the recommendation of the ALJ in the PFD and recommends that the Commission remand this matter back to SOAH and reopen the record in accordance with 30 TEX. ADMIN. CODE § 80.265 for two primary reasons: (1) the PFD recommends the Commission deny the Application based on procedural deficiencies, rather than the true merits of the Application, and (2) a denial without remand will further delay the issuance of a permit that is needed for more than 50 existing homes in the Sunrise Ranch Subdivision that are currently utilizing "pump and haul" to dispose of domestic wastewater.

Motions to reopen the record may be filed in accordance with 30 TEX. ADMIN. CODE § 80.265, which states:

The commission, on the motion of any party or on its own motion, may order the judge to reopen the record for further proceedings on specific issues in dispute. The commission's order shall include instructions as to the subject matter of further proceedings and the judge's duties in preparing supplemental materials or revised orders based upon those proceedings for the commission's adoption.<sup>5</sup>

In accordance with this rule, the Commission has authority to remand this matter back to SOAH, instructing the ALJ to reopen the record to allow for the introduction of additional testimony and evidence by UA on the Referred Issues in order to allow UA's new counsel adequate opportunity

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<sup>4</sup> Transcript of Proceedings before the State Office of Administrative Hearings, Offer of Proof by the Applicant UA Holdings, SOAH Docket No. 582-06-0393, TCEQ Docket No. 2005-1184-MWD, September 11, 2006.

<sup>5</sup> 30 TEX. ADMIN. CODE § 80.265.

to develop UA's case. Such action would also alleviate burdens of additional time and expense that would otherwise be incurred by all parties, as discussed below, if, instead, UA is required to refile a completely new application.

During the SOAH hearing, UA relied on advice from its previous counsel regarding the need for additional expert witnesses, decisions on continuances, and the timeframe for securing a permit in this matter. The PFD discussion indicates that UA may have been under the mistaken impression that it could rely solely on its rebuttal case to meet its burden of proof regarding the Referred Issues.<sup>6</sup> In addition, UA provided additional witnesses and evidence in its Offer of Proof after the hearing was closed by the ALJ. The fact that UA made such an Offer of Proof indicates that there was additional information and evidence UA could have presented in the record had it not been mistaken in its interpretation of evidentiary rules and procedures.

The directed judgment granted by the ALJ was based on the procedural deficiencies associated with the decision of UA's previous counsel to withhold certain witnesses until the presentation of UA's rebuttal case. The Commissioners should be afforded the opportunity to decide this matter on the true merits of the Application and draft permit and all of the evidence to be presented by UA, not these procedural deficiencies. As noted previously, UA has obtained new counsel to ensure that the procedural difficulties encountered in the first hearing do not recur. To deny the Application and cause UA to refile a new application for the same or a similar facility would cause *all* parties to bear the added expenses and delays associated with an entirely new permit application and potential contested case proceeding.

In the PFD, the ALJ indicates that the proper response to the Protestant's motion to dismiss would have been to file a motion to reopen the record. The ALJ also cites to Texas Rule of Civil Procedure 270, which permits the admission of additional evidence at any time, when

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<sup>6</sup> Administrative Law Judge's Proposal for Decision, issued November 10, 2006, at 7.

necessary to the due administration of justice. UA agrees with the ALJ that the proper action is a motion to reopen the record and would submit that the present situation justifies the application of Texas Rule of Civil Procedure 270. Furthermore, remanding this matter back to SOAH and reopening the record so that the ALJ may make a decision based on the merits of the case would not constitute a duplication of effort. At this stage in the proceeding, the parties have completed discovery and prepared for the hearing. Because the original hearing on the merits was concluded in one day, a remand would simply allow the parties to go back to SOAH and complete a hearing that everyone had already been prepared to conduct.

Finally, some weight should be given to the fact that currently more than 50 homes in the Sunrise Ranch Subdivision are relying on pump and haul as an alternative to discharging treated effluent in accordance with the draft permit. While UA concedes that it may have been premature to construct and sell homes without a discharge permit by which to dispose of treated effluent from those homes, construction has since ceased in the neighborhood as UA works with its new counsel to secure the necessary permit and ensure the proper disposal of wastewater from the subdivision. To deny UA an opportunity to satisfy its burden with regard to the Referred Issues would ignore the health and safety of the current residents in the Sunrise Ranch Subdivision and surrounding communities. TCEQ's own regulations recognize the inherent dangers of pump and haul operations: "holding tanks shall be used only on sites where other methods of sewage disposal are not feasible."<sup>7</sup> While this regulation applies only to on-site sewage facilities that handle less than 5,000 gallons per day, it reflects the Commission's concerns regarding the environmental risks of pump and haul operations. In this instance, a feasible alternative does exist, and is actually necessary to protect the current residents of Sunrise Ranch Subdivision and their neighbors.

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<sup>7</sup> 30 TEX. ADMIN. CODE § 285.34(e).

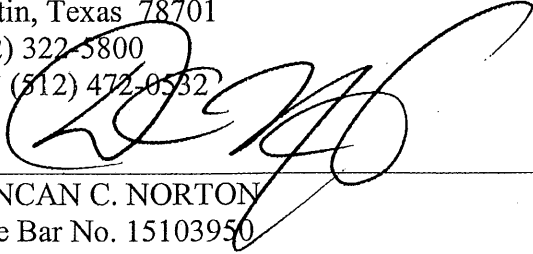
The best environmental permitting decisions are be based on a fully developed evidentiary record, not on omissions resulting from a failure "to present qualified witnesses," particularly when so doing results in the continuation of an environmentally risky pump and haul program for existing residences. As such, UA respectfully requests that the Commission remand this matter back to SOAH, and grant its motion to reopen the record with regard to each of the Referred Issues in accordance with 30 TEX. ADMIN. CODE § 80.265. Such an action would also be in accordance with the Texas Rules of Civil Procedure and SOAH's rules, and would afford all parties to this proceeding the most efficient, equitable, and inexpensive resolution to this matter. Though 30 TEX. ADMIN. CODE § 80.25 is not directly applicable to this case because UA does not wish to withdraw the Application and because the PFD has already been issued, UA is willing to reimburse the costs incurred by Protestants at the SOAH hearing in accordance with 30 TEX. ADMIN. CODE § 80.25(e)(2) in order to further the interests of justice in this matter.

### **III. PRAYER**

WHEREFORE, PREMISES CONSIDERED, UA respectfully requests that the Commission overrule the PFD, adopt an order remanding this matter back to SOAH, and grant its motion to reopen the record with regard to each of the Referred Issues.

Respectfully submitted,

LLOYD GOSSELINK BLEVINS  
ROCHELLE & TOWNSEND, P.C.  
816 Congress Avenue, Suite 1900  
Austin, Texas 78701  
(512) 322-5800  
Fax: (512) 472-0532



DUNCAN C. NORTON  
State Bar No. 15103950

ATTORNEY FOR UA HOLDINGS 1994-5

**CERTIFICATE OF SERVICE**

**UA HOLDINGS 1994-5  
SOAH DOCKET NO. 582-06-0393  
TCEQ DOCKET NO. 2005-1184-MWD**

I hereby certify that on this the 12<sup>th</sup> day of December 2006, a true and correct copy of the foregoing document was provided by hand delivery, first class mail, or facsimile to the following persons:

The Honorable Tommy L. Broyles  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West Fifteenth Street  
Austin, Texas 78701  
Fax: 475-4994

Scott Humphrey, Attorney  
Texas Commission on Environmental Quality  
P.O. Box 13087 (MC-103)  
Austin, Texas 78711  
Fax: 239-6377

Ms. LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087 (MC-105)  
Austin, Texas 78711  
Fax: 239-3311

James B. Blackburn, Jr.  
Blackburn Carter, P.C.  
4709 Austin  
Houston, Texas 77004  
Fax: (713) 524-5165

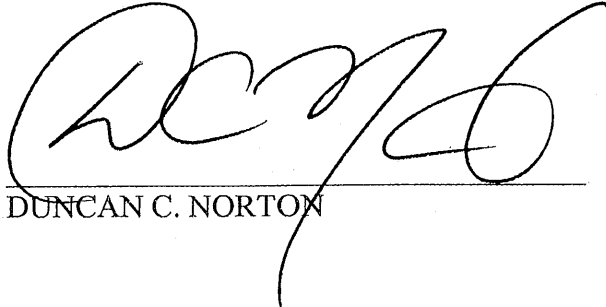
Anthony Tatu, Staff Attorney  
Texas Commission on Environmental Quality  
P.O. Box 13087 (MC-173)  
Austin, Texas 78711  
Fax: 239-0606

Maria Brasher  
257 Blue Heron Dr.  
Montgomery, Texas 77316

Pinar Dogru, Staff Attorney  
Texas Commission on Environmental Quality  
P.O. Box 13087 (MC-73)  
Austin, Texas 78711  
Fax: 239-0606

Phil Berthelot  
17814 N. Blue Heron Dr.  
Montgomery, Texas 77316-3107

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COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
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DUNCAN C. NORTON